tract existing between principal and agent. *Simpson* v. *Hand*, 6 Whart. (Pa.) 311, 36 Am. Dec. 231. In *Texas, etc.. Ry. Co.* v. *Tankersley, supra,* the court seemed to confuse the relation existing between bailor and bailee with that existing between principal and agent. It would seem that the principal case was correctly decided since the obnoxious doctrine of identification which arose in England has been overruled. *Mills* v. *Armstrong.* L. R. 12 Prob. Div. 58, overruling *Thorogood* v. *Bryan,* 8 C. B. 115. The doctrine of identification, when there is no privity of contract giving one party control over the other, has been disapproved in this country. *Little* v. *Hackett,* 116 U. S. 366. There is no common interest between bailor and bailee or no privity of contract giving the bailor control over the bailee and the former should not be responsible for the latter's negligence.

PARTY WALLS—COVENANT TO PAY COST OF ERECTION.—The assignor of the plaintiff and the defendant executed a contract whereby the defendant was to erect and pay for a party wall on the boundary-line beween their respective adjoining lots. The contract contained covenants stipulating that it was to be binding upon the assigns of each party and was to be a covenant running with the land. The plaintiff's assignor covenanted to pay one-half the cost of the erection of the party wall. *Held,* The covenant does not run with the land. *Hill* v. *City of Huron* (S. D.), 145 N. W. 570.

Much conflict of authority and nicety of distinction exists in the decision of questions similar to that involved in the principal case. The following courts are in accord with the principal case in holding that the covenant to pay the value of one half the wall when used by the non-builder is collateral to the land and hence personal to the original contracting parties, despite the fact that the parties expressly stipulate that the contractual covenants shall run with the land. *Bell* v. *Bronson,* 17 Pa. St. 363; *Crawford* v. *Krollpfeiffer,* 195 N. Y. 185, 88 N. E. 29; *Cook* v. *Paul,* 4 Neb. 93, 93 N. W. 430, 66 L. R. A. 673; *Nalle* v. *Paggi,* 81 Tex. 201, 16 S. W. 932, 13 L. R. A. 50. And under the peculiar wording and construction of the party wall contract, a similar result was reached by the Illinois court. *Gibson* v. *Holden,* 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146. So likewise the covenant to pay ceases to run when the builder expressly reserves to himself, in his sale of the lot built upon, his right of recovery for the use of the wall. *Pillsbury* v. *Morris,* 56 Minn. 492, 56 N. W. 170. The courts taking the view that such covenants of payment in party wall contracts do run with the land base their decisions on various grounds. Some hold that the original contract gives the builder a title or right of property in the wall, which passes out of him only by the use of the wall by another. Hence, they say, there is in effect a sale of the wall by the builder, to the user, whoever he may be, who thereupon becomes personally liable as a purchaser of half the wall. *Tomblin* v. *Fish.* 18 Ill. App. 439; *Richardson* v. *Tobey,* 121 Mass. 457. Some hold that one who buys from the non-builder with notice of the original agreement stands in the shoes of his grantor and takes the land subject to the burdens, as well as the bene-

fits, of such agreement. *Percival* v. *Colonial Inv. Co.*, 140 Iowa 275, 115 N. W. 941; *Ferguson* v. *Worrall*, 31 Ky. Law Rep. 219, 101 S. W. 966, 9 L. R. A. (N. S.) 1261. Other courts maintain that the covenant runs with the land because of the evident intention of the parties to that effect. *National Life Ins. Co.* v. *Lee*, 75 Minn. 157, 77 N. W. 794; *Noble* v. *Kendall*, 120 Mich. 545, 79 N. W. 810. Of course, where the obligation to pay is, in the original contract, expressly or impliedly made a lien on the lot of the non-builder, it attaches to the lot itself and passes with it into the hands of whatever person the lot may be. *Parsons* v. *Baltimore, etc., Ass'n*, 44 W. Va. 335, 29 S. E. 999, 67 Am. St. Rep. 769; *Osteen* v. *Bultman*, 94 S. C. 496, 78 S. E. 445; *Arnold* v. *Chamberlain*, 14 Tex. Civ. App. 634, 39 S. W. 201; *Mott* v. *Oppenheimer*, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409. So also, the obligation to pay may be expressly assumed by grantees of the original party wall contractors. *Ellensburg Lodge* v. *Collins* (Wash.), 122 Pac. 602. In some states the obligation to pay is made to run with the land by statute. *Irvin* v. *Peterson*, 25 La. Ann. 300; *Voigt* v. *Wallace*, 179 Pa. St. 520, 36 Atl. 315. The ruling in the principal case accords with the sounder doctrine, but the weight of authority is perhaps *contra*.

PRESCRIPTION—DISABILITY OF SERVIENT OWNER—BURDEN OF PROOF.—The defendant in a suit to try title to land asserted a right of way by prescription. *Held*, the burden of proof rests on the defendant to show that the owners of the servient estate were free from legal disability during the prescriptive period. *West* v. *City of Houston* (Tex.), 163 S. W. 679.

As a general rule, it is not necessary to allege or prove mere matters of defense, which come more properly from the other side. STEPHEN, PLEADING, 350. It is settled that capacity to contract is presumed, and one who would defend on the ground of *non sui juris* must bear the burden of proof. *Moore* v. *Sawyer*, 157 Fed. 826. This general rule has been applied in the case of prescriptive easements. *Fankboner* v. *Corder*, 127 Ind. 164, 26 N. E. 766. But the contrary has also been held. *Saunders* v. *Simpson*, 97 Tenn. 382, 37 S. W. 195.

A similar question has arisen in regard to the nature of the use. The weight of authority holds that the servient owner has the burden of showing that the use is merely permissive. *Fleming* v. *Howard*, 150 Cal. 28, 87 Pac. 908; *Smith* v. *Pennington*, 122 Ky. 355, 91 S. W. 730, 8 L. R. A. (N. S.) 149; *Majerus* v. *Barton* (Neb.), 139 N. W. 208. *Contra, Bradley Co.* v. *Dudley*, 37 Conn. 136.

It is hard to see why an exception to a settled rule should be made in the case of easements, even on the suggested theory that the capacity of the servient owner is an essential element in prescription, and so should be proved by one claiming thereunder. The same theory would apply with equal force in the case of contracts. Possibly the courts have been influenced by the feeling that prescriptive rights are in their nature encroachments, and ought not to be favored.

REFORMATION OF INSTRUMENTS—EXECUTORY LAND CONTRACT—ENFORCEMENT.—Through mutual mistake there was a failure to mention in a